Smt.Mooli & Ors. vs. Mukanchand & Ors.

SB Civil 1st Appeal No.147/1989

Date of Order: 29th March, 2007.

PRESENT

HON'BLE MR.JUSTICE BHAGWATI PRASAD

Mr.Jitendra Chopra for the appellant/s
None for the respondent/s.

Heard learned counsel for the parties.

This is an appeal by the appellants against the judgment and decree passed by the Addl.District Judge,Jaisalmer, dated 25.10.89, in civil original suit No.11/1985.

The suit was filed by the appellant Mooli , along with two other plaintiffs, against respondent Mukanchand, impleading five of her sons as proforma defendants. The suit was filed to get a declaration of property which was alleged by the plaintiff to be belonging to her husband. According to the plaintiff, after the death of her husband Bishnaram, there was a division for the property

among the sons of Bisahnaram, and the disputed plot came in her share and she constructed some part of it.

It is further alleged that in 1971 a suit was instituted by Mukanchand , defendant No.1, in which her five sons entered into a compromise and acceded the plot in question to Mukanchand. When she learnt about the suit, she filed the present suit and she sought a declaration that the plot in question was not of the share of Gordhan but was her share. She was not a party to the suit filed by Mukanchand for which Gordhan entered into an agreement that it is not binding on her. The plot in question came to her share and the share of her daughter and . Gordhan had no right to give it go Mukanchand .

Contesting the claim of the plaintiff, defendant No.1, Mukanchand, denied the claim of the respondents. There never was any division between the sons of Bishnaram. On a large part of the plot, Bishnaram had constructed a house. On the remaining part, which was of Mukanchand, Gordhan started raising construction . A suit was filed by Mukanchand in which there was a compromise and it was concluded that, that part belongs to Mukanchand .

On the basis of the pleading of the parties , following issues were set up :-

"1- आया वादग्रस्त मकान की जमीन (तलिया) वादिनी सं. 1 श्रीमती मूली के पति, वादी सं. 2 के पिता व वादी सं. 3 के दादा श्री विशनाराम की मिलकियत की थी, जो उनकी पैतृक सम्पति थी ?

2- आया प्रतिवादी मुकनचंद पोकरदास के गोद चले जाने से वादग्रस्त सम्पति में उसका अधिकार नहीं रहा?

3- आया हिन्दू उत्तराधिकार अधिनियम 1956 के अनुसार श्री विशनाराम की मृत्यु के उपरांत वादग्रस्त मकान के प्लोट में वादी सं. 1 व 2 का 2/7 हिस्सा आया ?

4- आया वादग्रस्त मकान की कीमत 10,000/- रूपये से अधिक थी अत: न्यायालय सिविल जिज जैसलमेर को सुनवाई का अधिकार था ? व कब्जे की प्रार्थना पर प्रतिवादी नं. 2 मुकनचंद ने कोर्ट फीस नहीं दी थी इसलिये कब्जे की डिक्री गैर कानूनी हैं ? और क्या यह इस वाद में उठाया जा सकता हैं ?

5- आया 27/71 न्यायालय मुंसिफ जैसलमेर जो बाद मेडीकानी दावा सं. 8/74 अदालत सिविल जज जैसलमेर में निर्णय

26.7.76 व उसमें की गई अपील में ए.डी.जे. नं. 1 जोधपुर का निर्णय दिनांक 31.3.78 ने वादीगण पक्षकार न होने के कारण व उक्त निर्णय व डिक्री व अपील के निर्णय से पाबंद नहीं हैं ?

6- क्या वादीगण एवं प्रतिवादीगण नं. 2 से 6 के बीच में वादग्रस्त जायदाद के बाबत जुबानी बंटवारा जनवरी 1970 में हुआ और उसमें वादग्रस्त प्लाट वादीगण के हिस्से में आया इसलिये यदि ऐसा है तो इसका क्या असर होगा ?

7- क्या मुकदमा नम्बर 8/74 सिविल जज लैसलमेर मुकनचंद बनाम गोरधन में राजीनामा करते वक्त प्रतिवादी गोरधन कर्ता खानदान था। उस हैसियत से उसने राजीनामा किया इसलिये वादीगण इस राजीनामे व डिक्री से बाध्य हैं ?

7 'ए'- क्या वादग्रस्त प्लाट पर जनवरी 1970 के बंटवारे के बाद वादीगण ने अपनी कमाई से एक कोठा व बरामदा बनाया व 8 हजार रूपये खर्च किये ? अत: ऐसा है तो उसका क्या हुआ होगा ?

8- आया वादीगण वादग्रस्त सम्पति में अपना हिस्सा घोषित कराने के अधिकारी हैं ?

9- आया वादीगण प्रतिवादी सं. 1 के विरूद्ध स्थायी निषेधाज्ञा इस आशय की प्राप्ति

करने के अधिकारी है कि वादीगण को वादग्रस्त सम्पति से बेदखल नहीं करे?

10- आया प्रतिवादीगण सं. 3 से 6 ने वादीगण से साजिश कर यह झूठा दावा पेश करवाया हैं ?

11- आया डिक्री दि. 26.7.76 व 31.3.78 को मनसुख कराए बिना दावा चलने योग्य नहीं हैं ?

12- आया डिक्री मनसुखी व स्थायी निषेधाज्ञा बाबत कोई न्याय शुल्क पेश नहीं किया हैं इसलिये वाद चलने योग्य नहीं है ?

13- आया वादग्रस्त मकान पर वादीगण का कब्जा नहीं हैं अगर हॉ तो इसका वाद पर क्या असर है ?

14- अनुतोष।"

Deciding issue No.1, the trial court came to the conclusion that plaintiff Mooli, in her statement, has failed to establish that how the plot in question came to her share. When was the division made in between the parties after the death of Bishnaram . She had even shown ignorance about the measurements

of the pot. She has not even established the division in between the heirs of Bishnaram. In her cross -examination she has refused to say as to how the disputed plot came in the share of Bishnaram.

Holding issue No.1 in favour of the defendant, the trial court held that in view of the compromise decree dated 26.07.76 the plot in question was held to be of Mukanchand. The trial court, deciding issue No.2, regarding adoption of Mukanchand to Pokardas, it has relied on the statement of PW/2 Mooli herself wherein she has stated that Mukanchand was the younger brother of her husband Bishnaram and after the death of Pokardas , Bishnaram gave Mukanchand in adoption. Thus, the fact of adoption pleaded against Mukanchand does not divest Bishanram from the property of his natural father because he was given in adoption after the death of natural father.

According to the plaintiff herself, after the death of Pokardas it was not possible for Pokardas to have adopted Mukanchand, and, therefore, the fact of adoption cannot be read against Mukanchand because the adoption was not found established to have taken place legally.

Issue No.3 was decided against the plaintiff by the trial court by holding that on the disputed plot, Bishnaram had no right because the division has not been established by metes and bounds. Issue No.8 was also decided against the plaintiff. Issue No.9 was decided against the plaintiff by holding that when the plot has been held to be of the share of Mukanchand, he is entitled to get the possession of the plot. Regarding issue No.10, the trail court has found that defendant Gordhan has been doing every act on the part of the plaintiff. Therefore, the suit was contested by Gordhan after conspiring with the plaintiff, his mother , to defeat the decree by compromise , in which Gordhan was a willing party . The suit was said to have been instituted under a conspiracy among the consenting party . The plaintiff- mother had hardly known anything, and thus the finding established that it was a suit which was instituted with malafide intention.

Issue No.11 was held against the plaintiff and it was held by the trial court that unless the decree by compromise is set aside, no relief can be granted to the plaintiffs. Issue No,12 related to the court fees and jurisdiction, which was not pressed by the defendants . Regarding issue No.13 it was held that the defendant No.1 is entitled to recover the possession of the property in question

in terms of the decree passed by the compromise in the court of Civil Judge Jaisalmer. Issue No.4 was decided against the plaintiffs by holding that since the court has held that in pursuant to the decree of the court of Civil Judge,Jaisalmer, the defendant is entitled to possession, therefore, no injunction can be granted against defendant No.1.

Issue No.5 was decided against the plaintiff by holding that after the death of Bishnaram, Gordhan was the Karta of the family and whatever was done by him, was binding on the family and, therefore, the issue was decided against the plaintiffs.

Issue No.6 was decided against the plaintiff by holding that since the plot was not the property of Bishnaram, the plaintiffs were not entitled to any relief . Issue No.7 was held against the plaintiff and it was held that it was under a conspiracy that the suit was filed in the name of the mother. The suit was filed, being a result of conspiracy of those who were party to the earlier decree. The issue was decided against the plaintiffs. Issue No.9 was also decided against the plaintiff.

Arguing the appeal, the learned counsel for the appellant

urged that the fact of adoption have not been rightly considered by the trial court. The property was ancestral and, therefore, plaintiff No.3 , son of Gordhan, had a share in the property, by birth. He could not have been denied the share. The property being HUF property, every coparcener had the share and, therefore, suit could not have been dismissed and the share of the plaintiffs should have been ordered to be granted to the appellants.

Per contra, the learned counsel for the defendant, submitted that the property was ancestral property and Gordhan had already constructed on a part of the plot, which was a major part and, therefore, what has come in the share of defendant No.1, he got it. Gordhan and his brothers have entered into a compromise which recognised the rights of defendant No.1 and thus the said compromise resulted into a decree.

The present suit, according to the trial court , is a result of conspiracy in between defendant No.2 and his mother Mooli. Since Gordhan could not have challenged a compromise decree, therefore, it was a convenient mode to set up his mother as the plaintiff and in that view of the matter, the whole exercise is the result of conspiracy.

The appeal against the compromise decree having failed, the decree became absolute. That was not challenged by the plaintiffs on any count, and unless that decree was set aside that is binding on the other members because Gordhan was the Karta of the family, of which the coparceners have tried to agitate for their share. Since the Karta has entered into compromise and that he has already constructed a house on part of plot, therefore, it cannot be said that the compromise was a compromise without consideration .

Learned counsel for the appellant has relied on Nandkishore vs. Brijbehari (RLW 1954, 563) for showing that Mukanchand himself had admitted the adoption, therefore, he had no share. Suffice it to say that this case will not govern the facts of the present appeal, in the background that plaintiff herself has admitted that adoption had taken place after the death of Pokardas . The fact of adoption having alleged to have occurred after death cannot have effect. After death, Pokardas could not have adopted Mukanchand. Adoption had been legally made and all formalities have been established, has to be proved which has not been done. It can not be said that Pokardas died and after his death the adoption took place. The formalities having not been established the trial court has not

accepted the fact of adoption, and rightly so.

The question of adoption of Mukanchand stands negated. The rights of Mukanchand have been recognised by the five proforma respondents Gordhan and his brothers. The finding of the trial court that Gordhan has set up his mother Mooli to bypass the decree of the compromise is a fact, which goes a long way and thus, Gordhan having already got a major part of the plot to his share, rights of Mukanchand have been rightly recognised by the trial court and the suit of the plaintiff have rightly been dismissed.

In that view of the matter, the findings of the trial court are not liable to be disturbed. No force , the appeal is dismissed.

(BHAGWATI PRASAD), J.

L.George